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7  
8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10 SAN FRANCISCO DIVISION  
11

12 UNITED STATES OF AMERICA, ) No. CR-04-0118 PJH  
13 Plaintiff, )  
14 v. ) PLEA AGREEMENT  
15 ROBERT MICHAEL MCKIMMEY, )  
16 Defendant. )

17  
18 I, Robert Michael McKimney, and the United States Attorney's Office for the Northern  
19 District of California (hereafter "the government") enter into this written plea agreement (the  
20 "Agreement") pursuant to Rules 11(c)(1)(A) and 11(c)(1)(B) of the Federal Rules of Criminal  
21 Procedure:

22 The Defendant's Promises

23 1. I agree to waive grand jury indictment and plead guilty to the captioned information  
24 charging me with conspiracy to commit theft and downloading of trade secrets, fraud in  
25 connection with computers, and interstate transportation of stolen property, in violation of 18  
26 U.S.C. §§ 1832(a)(5) and 371. I agree that the elements of the offense and the maximum  
27 penalties are as follows: (1) on or about the dates alleged in the information, there was an  
28 agreement between two or more persons to commit at least one crime as charged in the

1 information (in this case, theft and downloading of trade secrets, fraud in connection with  
2 computers, and/or interstate transportation of stolen property); (2) I became a member of the  
3 conspiracy knowing of at least one of its objects and intending to help accomplish it; and (3) one  
4 of the members of the conspiracy performed at least one overt act for the purpose of carrying out  
5 the conspiracy.

- |    |    |                                 |  |
|----|----|---------------------------------|--|
| 6  | a. | Maximum prison sentence         | 10 years   |
| 7  | b. | Maximum fine                    | \$250,000 or twice the gross<br>8 gain or gross loss whichever<br>is greater |
| 9  | c. | Maximum supervised release term | 3 years  |
| 10 | d. | Mandatory special assessment    | \$100  |
| 11 | e. | Restitution                     | To be determined   |

12 2. I agree that I am guilty of the offense to which I will plead guilty, and I agree that the  
13 following facts are true with regard to the time frame alleged in the information:

14 a. Business Engine Software Corporation (BES) was a privately funded company  
15 which manufactured, licensed, and provided enterprise application software products and  
16 services that allow companies to manage projects, resources, and budgets. It had offices in: San  
17 Francisco and Ontario, California; Virginia Beach, Virginia; New York, New York; Chicago,  
18 Illinois; King of Prussia, Pennsylvania; Belgium; the United Kingdom; and India.

19 I was employed by BES as the Chief Technology Officer in its Virginia Beach, Virginia office. I  
20 was also a member of BES's Board of Directors and one of BES's equity owners.

21 b. I was aware that Niku Corporation (Niku) was a publicly traded company  
22 which manufactured, licensed, and provided enterprise application software and services for  
23 companies to manage and govern their projects, resources, and budgets. I learned that it had  
24 twenty offices in the United States and overseas including its headquarters in Redwood City,  
25 California and offices in: Petaluma, California; New York, New York; Chicago, Illinois;  
26 Atlanta, Georgia; Pittsburgh, Pennsylvania; Lovina, Michigan; Exeter, New Hampshire; the  
27 United Kingdom; the Netherlands; France; Germany; and Australia. Niku was one of BES's  
28 direct competitors in the enterprise software industry.

1            \_\_\_            c. Beginning on date unknown but at least by October of 2001, and continuing to  
2 in or about July of 2002, in the Northern District of California and elsewhere, I knowingly and  
3 intentionally conspired and agreed with other persons to commit the following offenses: theft  
4 and downloading of trade secrets, in violation of 18 U.S.C. §§ 1832(a)(1) and (a)(2); fraud in  
5 connection with computers, in violation of 18 U.S.C. § 1030(a)(4); and interstate transportation  
6 of stolen property, in violation of 18 U.S.C. § 2314.

7            d. It was part of the conspiracy that I would and did knowingly, and with intent to  
8 defraud, access victim Niku's computer network and applications without authorization, and by  
9 means of such conduct further the intended fraud, and obtain things of value including Niku trade  
10 secrets.

11            e. It was further part of the conspiracy that I would and did steal, and without  
12 authorization knowingly take by fraud, artifice, and deception, Niku trade secrets.

13            f. It was further part of the conspiracy that I would and did knowingly download,  
14 copy, and transmit Niku trade secrets without authorization.

15            g. It was further part of the conspiracy that I would and did knowingly transport,  
16 transmit, and transfer in interstate commerce goods, wares, and merchandise having a  
17 value exceeding \$5,000, knowing the same to have been stolen, converted, and taken by fraud  
18 from Niku.

19            h. It was further part of the conspiracy that I would and did: (1) access Niku's  
20 computer network and applications without authorization; (2) steal, download, and copy things of  
21 value including Niku trade secrets; and (3) transmit some of those things of value including Niku  
22 trade secrets to other BES officers and employees – all so that BES could maintain a competitive  
23 edge over its direct competitor, Niku.

24            i. In furtherance of the conspiracy and to effect its objects, I committed, among  
25 others, the following overt acts in the Northern District of California and elsewhere:

26                            I. Beginning in or about October of 2001, and continuing to in or about  
27 July of 2002, I knowingly accessed Niku's computer network and applications without  
28 authorization; and

1                   II. Beginning in or about October of 2001, and continuing to in or about  
2 July of 2002, I stole, downloaded, and copied things of value including trade secrets from Niku's  
3 computer network and applications.

4           3. I agree to give up all rights that I would have if I chose to proceed to trial, including  
5 the rights to be charged by grand jury indictment; to a jury trial with the assistance of an attorney;  
6 to confront and cross-examine government witnesses; to remain silent or testify; to move to  
7 suppress evidence or raise any other Fourth or Fifth Amendment claims; to any further discovery  
8 from the government; and to pursue any affirmative defenses and present evidence. To the extent  
9 I have a right to have facts that are used to determine the sentence (including any Sentencing  
10 Guideline factors and any departure grounds) charged in a grand jury indictment or information  
11 and found by a jury at trial beyond a reasonable doubt (see Blakely v. Washington, 124 S. Ct.  
12 2531 (2004)), I waive those rights except that I agree that the Court will find the facts that  
13 determine my sentence under the Sentencing Guidelines beyond a reasonable doubt.

14           4. I agree to give up my right to appeal my conviction, the judgment, and orders of the  
15 Court. I also agree to waive any right I may have to appeal my sentence, except that I specifically  
16 reserve my right to appeal the Court's determination of loss for purposes of the Sentencing  
17 Guidelines.

18           As to any matter in which I am cooperating with the government pursuant to this  
19 agreement, I waive any right I may have to assert the attorney-client privilege to decline to  
20 answer questions relating to communications with counsel for any other defendant including a  
21 defendant acting pro se, except as to communications where counsel for the other defendant was  
22 my attorney of record. I also waive my right to conflict-free representation by any attorney or  
23 pro se defendant where a conflict arises from that attorney's or defendant's participation in a  
24 joint defense agreement to which I also was a party.

25           5. I agree not to file any collateral attack on my conviction or sentence, including a  
26 petition under 28 U.S.C. §2255, at any time in the future after I am sentenced, except for a claim  
27 that my constitutional right to the effective assistance of counsel was violated.

28           6. I agree not to ask the Court to withdraw my guilty plea at any time after it is entered.

1           7. In return for the government's promises set out below, I agree that the Court may order  
2 and I will pay restitution for all the losses caused by all the schemes or offenses with which I was  
3 charged in this case, and I agree that the amount of restitution will not be limited to the loss  
4 attributable to the count to which I am pleading guilty, pursuant to 18 U.S.C. § 3663(a)(3). I  
5 agree that I will make a good faith effort to pay any fine, forfeiture or restitution I am ordered to  
6 pay. Before or after sentencing, I will, upon request of the Court, the government, or the U.S.  
7 Probation Office, provide accurate and complete financial information, submit sworn statements  
8 and give depositions under oath concerning my assets and my ability to pay, surrender assets I  
9 obtained as a result of my crimes, and release funds and property under my control in order to  
10 pay any fine, forfeiture, or restitution. I agree to pay the special assessment at the time of  
11 sentencing.

12           8. I agree to cooperate with the U.S. Attorney's Office before and after I am sentenced.  
13 My cooperation will include, but will not be limited to, the following:

- 14           a. I will respond truthfully and completely to any and all questions put to me, whether  
15           in interviews, before a grand jury or at any trial or other proceeding;
- 16           b. I will provide all documents and other material asked for by the government;
- 17           c. I will testify truthfully at any grand jury, court or other proceeding as requested by  
18           the government;
- 19           d. I will surrender any and all assets acquired or obtained directly or indirectly as a  
20           result of my illegal conduct;
- 21           e. I will request continuances of my sentencing date, as necessary, until my  
22           cooperation is completed;
- 23           f. I will tell the government about any contacts I may have with any co-defendants or  
24           subjects of investigation, or their attorneys or individuals employed by their  
25           attorneys; and
- 26           g. I will not reveal my cooperation, or any information related to it, to anyone without  
27           prior consent of the government.

28           9. I agree that the government's decision whether to file a motion pursuant to USSG  
§5K1.1, as described in the government promises section below, is based on its sole and  
exclusive decision of whether I have provided substantial assistance and that decision will be  
binding on me. I understand that the government's decision whether to file such a motion, or the

1 extent of the departure recommended by any motion, will not depend on whether convictions are  
2 obtained in any case. I also understand that the Court will not be bound by any recommendation  
3 made by the government.

4 10. I agree not to commit or attempt to commit any crimes before sentence is imposed or  
5 before I surrender to serve my sentence; violate the terms of my pretrial release (if any);  
6 intentionally provide false information or testimony to the Court, the Probation Office, Pretrial  
7 Services, or the government; or fail to comply with any of the other promises I have made in this  
8 Agreement. I agree that, if I fail to comply with any promises I have made in this Agreement,  
9 then the government will be released from all of its promises, but I will not be released from my  
10 guilty plea.

11 11. If I am prosecuted after failing to comply with any promises I made in this Agreement,  
12 then (a) I agree that any statements I made to any law enforcement or other government agency or  
13 in Court, whether or not made pursuant to the cooperation provisions of this Agreement, may be  
14 used in any way; (b) I waive any and all claims under the United States Constitution, Rule 11(f)  
15 of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence, or any  
16 other federal statute or rule, to suppress or restrict the use of my statements, or any leads derived  
17 from those statements; and (c) I waive any defense to any prosecution that it is barred by a statute  
18 of limitations, if the limitations period has run between the date of this Agreement and the date I  
19 am indicted.

20 12. I agree that this Agreement contains all of the promises and agreements between the  
21 government and me, and I will not claim otherwise in the future.

22 13. I agree that this Agreement binds the U.S. Attorney's Office for the Northern District  
23 of California only, and does not bind any other federal, state, or local agency.

24 The Government's Promises

25 14. The government agrees not to file or seek any additional charges against the defendant  
26 that could be filed as a result of the investigation that led to the pending information.

27 15. The government agrees not to use any statements made by the defendant pursuant to  
28 this Agreement against him, unless the defendant fails to comply with any promises in this

1 agreement. The government may, however, tell the Court and the U.S. Probation Department  
2 about the full extent of the defendant's criminal activities in connection with the calculation of  
3 the Sentencing Guidelines.

4 16. If, in its sole and exclusive judgment, the government decides that the defendant has  
5 cooperated fully and truthfully, provided substantial assistance to law enforcement authorities  
6 within the meaning of U.S.S.G. §5K1.1, and otherwise complied fully with this Agreement, it  
7 will file with the Court a motion under §5K1.1 and/or 18 U.S.C. §3553 that explains the nature  
8 and extent of the defendant's cooperation and recommends a downward departure.

9 17. Based on the information now known to it, the government will not oppose a  
10 downward adjustment of three levels (if available) for acceptance of responsibility under  
11 U.S.S.G. § 3E1.1.

12 The Defendant's Affirmations

13 18. I confirm that I have had adequate time to discuss this case, the evidence, and this  
14 Agreement with my attorney, and that he has provided me with all the legal advice that I  
15 requested.

16 19. I confirm that while I considered signing this Agreement and, at the time I signed it, I  
17 was not under the influence of any alcohol, drug, or medicine.

18 20. I confirm that my decision to enter a guilty plea is made knowing the charges that have  
19 been brought against me, any possible defenses, and the benefits and possible detriments of  
20 proceeding to trial. I also confirm that my decision to plead guilty is made voluntarily, and no  
21 one coerced or threatened me to enter into this agreement.

22 Dated: \_\_\_\_\_

23 \_\_\_\_\_  
24 ROBERT MICHAEL MCKIMMEY  
25 Defendant

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KEVIN V. RYAN  
United States Attorney

Dated: \_\_\_\_\_

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ROSS W. NADEL  
Chief, Criminal Division

I have fully explained to my client all the rights that a criminal defendant has and all the terms of this Agreement. In my opinion, my client understands all the terms of this Agreement and all the rights he is giving up by pleading guilty, and, based on the information now known to me, his decision to plead guilty is knowing and voluntary.

Dated: \_\_\_\_\_

\_\_\_\_\_  
JOSEPH M. BURTON  
Attorney for Defendant